(23)

No. 1228

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT R. WILLIAMS, ANNA M. WILLIAMS, the wife of said ROBERT R. WILLIAMS, and formerly ANNA M. PERRY, JOHN W. DuBOSE and RALPH B. FERGUSON,

Petitioners,

v.

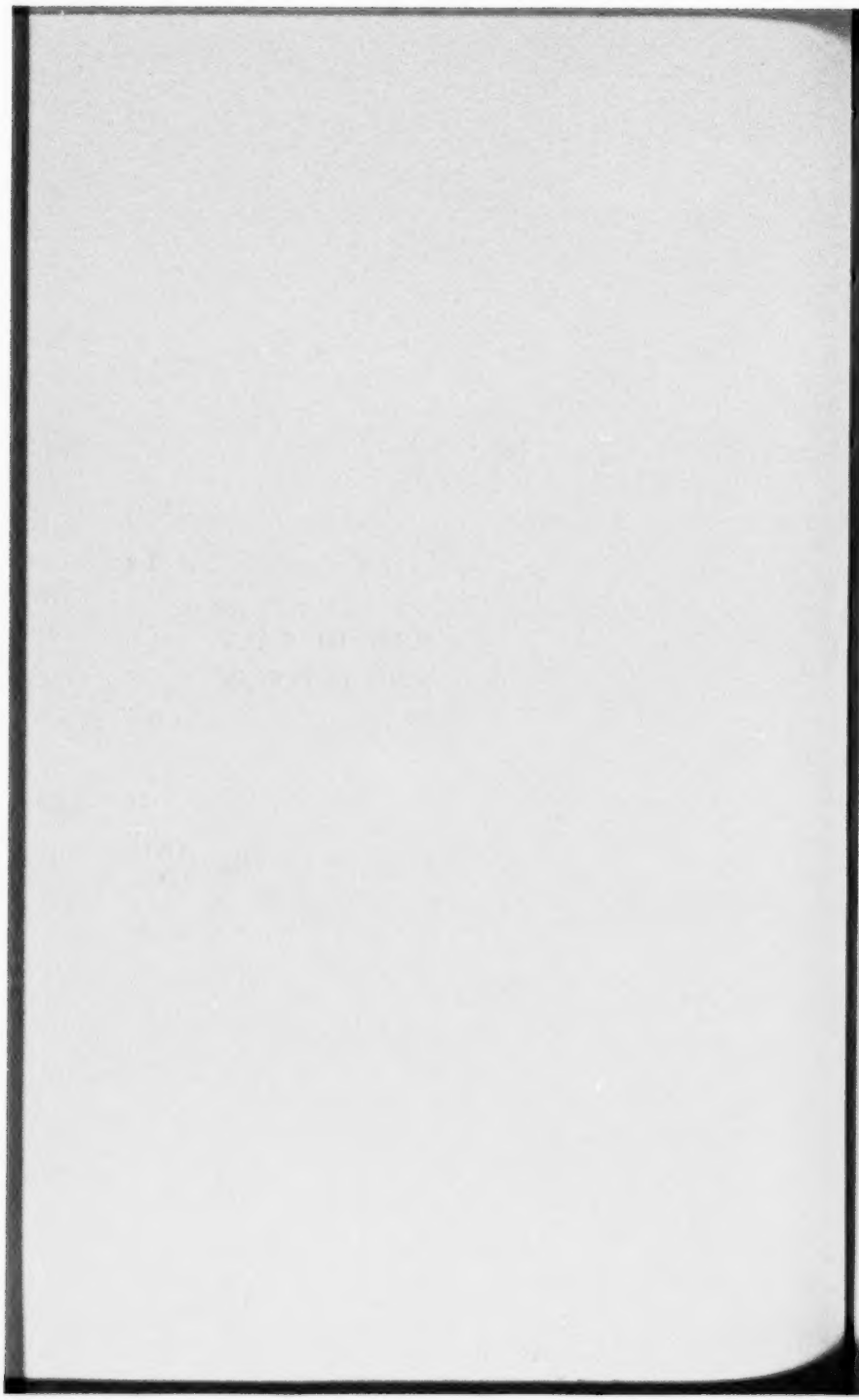
KENNETH S. KEYES, ALEX M. BALFE, C. D. VAN ORSDEL and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation,

Respondents.

BRIEF OF RESPONDENTS KENNETH S. KEYES, ALEX M. BALFE, and C. D. VAN ORSDEL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

M. LEWIS HALL,
916 Ingraham Building,
Miami, Florida.

Attorney for Respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. VAN ORSDEL.



INDEX

ALPHABETICAL LIST OF AUTHORITIES CITED

TEXT BOOKS

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT R. WILLIAMS, ANNA M. WILLIAMS, the wife of said ROBERT R. WILLIAMS, and formerly ANNA M. PERRY, JOHN W. DuBOSE and RALPH B. FERGUSON,

Petitioners,

v.

KENNETH S. KEYES, ALEX M. BALFE, C. D. VAN ORSDEL and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation,

Respondents.

BRIEF OF RESPONDENTS KENNETH S. KEYES, ALEX M. BALFE, and C. D. VAN ORSDEL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

By reason of certain inaccuracies and omissions in the Statement of the Case made in the petition for certiorari and the brief in support thereof, we will file a supplemental Statement of the Facts.

The designation of parties adopted in Petitioners' brief will be followed herein, namely: the Petitioners who were Third Party Defendants will sometimes be referred to in this brief as Third Party Defendants. The respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. VAN ORSDEL were Plaintiffs in the trial

court, and will be so referred to herein. The respondent, United States Fidelity and Guaranty Company was Defendant in the trial court and will be so referred to herein.

The Circuit Court of Dade County, Florida, entered its final decree ordering a recall election of three commissioners of the City of Miami, Florida, to-wit: ROBERT R. WILLIAMS, JOHN W. DuBOSE and RALPH B. FERGUSON, in a suit brought by the Respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. VAN ORSDEL, against the City Commissioners and the Clerk of the City of Miami, Florida. An appeal from said final decree was taken to the Supreme Court of Florida and a Supersedeas Bond was given. The bond was signed by Robert R. Williams, *as Mayor-Commissioner,* John W. DuBose, Ralph B. Ferguson and Anna M. Perry, respectively *as Commissioners of the City of Miami, Florida,* as Principals, and the United States Fidelity and Guaranty Company, as Surety, (Tr. 12). The Supreme Court of Florida affirmed the decree ordering the recall election. *(186 So. 250).* The recall election was held and the said three commissioners were recalled. Thereafter, this action was instituted in the State Court by the Respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. Van ORSDEL, against the Respondent, United States Fidelity and Guaranty Company, as Surety upon said Supersedeas Bond, for having failed to pay the damages sustained by them by reason of the appeal to the Florida Supreme Court. Thereupon, the said defendant, United States Fidelity and Guaranty Company, because of the diversity of citizenship, removed this action to the United States District Court, in and for the Southern District of Florida.

Before pleading to the declaration, the defendant surety company filed a Third Party complaint against ROBERT R. WILLIAMS, JOHN W. DuBOSE, RALPH B. FERGUSON and ANNA M. PERRY, and the CITY OF MIAMI, FLORIDA, a municipal corporation *(Tr. 16)*. This Third Party complaint set out an Indemnity Agreement between the above-named persons and the defendant whereby they agreed to indemnify the defendant in the event it became liable on said bond; and, asked for a judgment against the Third Party Defendants for any amount which the Plaintiff might recover against it in this suit. Thereupon, said persons as Third Party Defendants moved the Court to remand the action to the State Court and dismiss the plaintiffs' action on the ground of lack of jurisdiction and failure of the declaration to state a claim *(Tr. 51-52)* which motion to remand was denied*(Tr. 54-55)*. The motion to dismiss was not ruled upon. Upon motion of the defendant, the City of Miami was dismissed, no service of process having been obtained upon it. The Third Party Defendants filed no further pleadings. The case came on for trial upon the answer of the surety company. Verdict was rendered by the Jury and judgment entered by the Court on Plaintiffs' declaration against said Defendant (Tr. 58, 59 & 60). Final judgment was also entered against the Third Party Defendants in favor of the Third Party Plaintiff *(Tr. 60-61)*. No appeal was taken to the Circuit Court of Appeals by the defendant surety (Plaintiffs' sole judgment debtor) from the Plaintiffs' judgment but an appeal was taken by said Third Party Defendants from both of said judgments *(Tr. 62)*.

The Circuit Court of Appeals for the Fifth Circuit affirmed both of said judgments. *(125 Fed. 2d 208)*.

The principal inaccuracy of Petitioners' Statement of the Case consists of repeated references to the Third

Party Defendants as being the principals on the surety bond upon which the Respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. Van ORSDEL, brought their action in the State Court. It will be noted, however, from our Supplemental Statement and the transcript references that the bond was signed by certain principal parties in their representative capacity *as officials of the City of Miami, Florida,* whereas, they were made Third Party Defendants, not in an official capacity, but as individuals upon an Indemnity Agreement, which Indemnity Agreement was executed not as officials of the City of Miami, Florida, but as individuals, (Tr. 21-43 inc.)

The vital omission in Petitioners' Statement of the Case consists in its failure to advise this Court that the Defendant Surety who is sole judgment debtor in the judgment of the respondents, KENNETH S. KEYES, ALEX M. BALFE and C. D. VAN ORSDEL did not appeal from the judgment; and it will be noted that it has not filed a petition for certiorari in this Court.

SUMMARY COVERING POINTS OF FACT AND LAW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The two questions presented by Petitioners' brief assume that the Supersedeas Bond created a joint liability of the principals and the surety which was one of the propositions of law presented to the District Court and Circuit Court of Appeals and found contrary to Petitioners' contention.

Furthermore, the Circuit Court of Appeals found that even though the obligation was joint, the Federal Court had jurisdiction because at the time of removal the cause stood bona fide as one between resident plaintiffs and a single non-resident defendant.

Summarizing the propositions of law as applied to the facts, we submit:

FIRST: Appeal to the Circuit Court was not taken by these respondents' judgment debtor, and said judgment is not reviewable at the instance of the petitioners who are not parties to these respondents' judgment. (Argued under conclusion, pages 22, 23.)

SECONDLY: It affirmatively appears from the facts which are correctly recited in the opinion of the Circuit Court of Appeals that no question is involved which would warrant the granting of the petition for certiorari.

In support of this proposition, we submit the opinion reported in *125 Fed. 2d 208*, also transcript, pages 78 to 81, inclusive, and the opinion of Mr. Chief Justice Taft, in the case of *MAGNUM IMPORT COMPANY v. HOUBIGANT, INC.*, reported in *262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922*, wherein he said (Text 924):

> "***The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uni-

formity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

(Argued under Question 1, pages 8 to 11.)

On the question of the correctness of the decision of the District Court and the Circuit Court of Appeals, we summarize the propositions of law involved as follows, to-wit:

I.

The District Court properly refused to grant the motion to remand the case to the State Court, in which case the Obligees in a Supersedeas Bond, as Plaintiffs, made the surety the sole defendant, and the surety removed the case to the District Court on the ground of diversity of citizenship, and thereafter brought in Third Party resident defendants seeking judgment against them on an Indemnity Agreement.

Federal jurisdiction attached when the case was pending between resident plaintiffs and a single non-resident defendant, and the fact that residents of the same state as of the Plaintiffs were brought in as Third Party Defendants subsequent to the removal did not divest the Federal Court jurisdiction. (Argued under Question 1, pages 8 to 11.)

II.

The Obligees in a Supersedeas Bond instituted this action in a State Court of Florida against the surety who removed the case to the Federal Court on the

ground of diversity of citizenship and brought in Third Party Defendants alleging them to be indemnitors which said Third Party Defendants filed their motions to dismiss the action on the ground that the Plaintiffs should have instituted their action jointly against the principals and surety on the bond—the bond providing that certain persons as principals and X surety company as surety are held and firmly bound unto the Obligees for payment of which the undersigned principals and surety firmly bind themselves by these presents—the lower court entered no order on the motion to dismiss. Petitioners contend that the final judgment was in effect a denial of such motion.

(a) Assuming that the bond was joint and that the action in the State Court should have been against both principals and surety, when the case was removed to the Federal Court under the Third Party Rule, the Third Party Defendants were then in a position to assert any defenses which they could have asserted had they been originally made joint defendants. (Argued under Question 2, pages 13 to 15.)

(b) The obligations of the surety in said bond created a several liability. (Argued under Question 2, pages 16 to 21.)

(c) The Petitioners (Third Party Defendants in the District Court) by not obtaining a ruling on their motion to dismiss waived their right to have this question reviewed by this Court. (Argued under Question 2, pages 12 to 13.)

The above propositions of law, numbered I and II, give rise to two questions which are respectively set forth as Questions 1 and 2, and for the sake of brevity, will only be quoted in the Argument.

ARGUMENT

QUESTION I:

WHERE OBLIGEES IN A SUPERSEDEAS BOND, INSTITUTED SUIT AGAINST THE SURETY ALONE IN THE STATE COURT OF FLORIDA TO RECOVER DAMAGES COVERED BY THE BOND, AND THE SURETY REMOVED THE CASE TO THE UNITED STATES DISTRICT COURT ON THE GROUND OF DIVERSITY OF CITIZENSHIP AND THEREAFTER BROUGHT IN THIRD PARTY DEFENDANTS SEEKING JUDGMENT AGAINST THEM ON AN INDEMNITY AGREEMENT, (SAID THIRD PARTY DEFENDANTS LIKE PLAINTIFFS WERE RESIDENTS OF FLORIDA)—SHOULD THE LOWER COURT HAVE GRANTED A MOTION TO REMAND THE CAUSE FILED BY THE THIRD PARTY DEFENDANTS ON THE GROUND THAT THE LIABILITY OF THE PRINCIPALS AND SURETY WAS JOINT?

Irrespective of whether the obligation of the bond be joint or several, the Federal Court properly exercised its jurisdiction in refusing to remand to the State Court. The Third Party Defendants were brought into Court, by the original defendant and judgment sought against them on an Indemnity Agreement (Tr. 16-43). With this quarrel, the original plaintiffs had nothing to do or say.

This point of jurisdiction was squarely decided in the case of *SKLAR et ux. v. HAYES (Singer, Third Party Defendant), 1 Federal Rules Decision, 541.* We quote from the Opinion therein, page 416, to-wit:

> "(2-4) The further objection that the lack of diversity of citizenship between the plaintiffs and the third-party defendant prevents the introduction of the latter into the suit cannot be

sustained. Such an objection is not well founded, as it appears that the causes of action set forth in these third-party complaints are ancillary or auxiliary to those in the original complaints and so these third-party complaints need not set forth independent grounds of jurisdiction. Since the Federal Rules of Civil Procedure became effective it has been generally held that controversies presented by third-party complaints are properly within the jurisdiction of the court. See Bossard v. McGwinn et al., D. C., 27 F. Supp. 412; Morrell v. United Air Lines Transport Corporation, D. C., 29 F. Supp. 757, 759; Crum v. Appalachian Electric Power Co. et al., D. C., 29 F. Supp. 90, 91; Gray v. Hartford Accident & Indemnity Co. D. C., 31 F. Supp. 299, 305. To regard such controversies otherwise would be to defeat the purpose of the rule—which is to avoid circuity of action and to adjust, in a single suit, several phases of the same controversy as it affects the parties. Holtzoff, 'New Federal Procedure and the Court,' P. 49."

The District Court's refusal to remand this cause is thus substantiated by all the adjudicated cases and by logic and reason. The surety company admitted that the plaintiffs had a separable cause of action against it when it removed the case to the Federal Court; and, to allow the Third Party Defendants who had no interest in the controversy between the plaintiffs and the surety company to remand this cause would be to defeat the federal jurisdiction of the main suit by an ancillary or auxiliary one.

The case of *BOSSARD et ux. v. McGWINN et al., 27 Fed. Supp. 412*, was relied upon by the District Judge in writing the Opinion above quoted from and presents facts analogous to this case. We quote therefrom (pages 412-413), to-wit:

"This is an action originally brought in the court of Common Pleas of Erie County, Pennsylvania, by plaintiffs to recover from the defendant McGwinn damages for personal injuries alleged to have been received by plaintiff, Elsie M. Bossard, when she was riding as a passenger in an automobile owned and operated by the third party defendant Siegel, which came into collision with an automobile driven by the defendant McGwinn. The collision, Mrs. Bossard alleged, was caused by the negligence of the defendant McGwinn.

"McGwinn is a citizen of the State of Ohio. The amount in controversy is over $3,000 exclusive of interest and costs. On the petition of McGwinn the case was removed into this court.

"Whereupon, the defendant McGwinn filed a motion in this court under Rule 14 (a) of the New Rules for Civil Procedure, 28 U.S.C.A. following section 723c, to make John W. Siegel, the driver of the car in which the Plaintiff, Elsie M. Bossard, was riding at the time of the collision, a third-party defendant, and for leave to serve a summons and complaint on John W. Siegel, a person who is not a party to the action, and who is, or may be, liable to the defendant McGwin, or to the plaintiffs for all or part of the plaintiffs' claim against the defendant McGwinn. The Court granted this motion.

"(1, 2) Siegel, a resident of this District, was served with a summons and complaint under this rule, has appeared specially, and moved that the summons and complaint making him a third-party defendant be quashed. This motion to quash is based on the fact that the plaintiffs and the third-party defendant Siegel are both residents of Pennsylvania in this District. Of course, this court would have no original jurisdiction of a suit by plaintiffs against Siegel. As we construe Rule 14 as to third

parties, the third-party claim is not to be regarded as such a claim as requires independent jurisdictional grounds, but as an ancillary claim to the original suit. Before the new rules even, this ancillary jurisdiction was applied in equity in the Federal Court. See Alexander V. Hillman, 296 U. S. 222, 56, S. Ct. 204, 80 L. Ed. 192.***"

Having found no authority to the contrary, we respectfully submit that, regardless of the nature of the obligation of the bond, the situation of bringing in the indemnitors on the bond as third-party defendants, presents an ancillary controversy which is exactly the reason why the third-party rule was designed and adopted.

QUESTION II:

OBLIGEES IN A SUPERSEDEAS BOND INSTITUTED ACTION IN THE STATE COURT OF FLORIDA AGAINST SURETY WHO REMOVED THE CASE TO THE FEDERAL COURT ON THE GROUND OF DIVERSITY OF CITIZENSHIP AND BROUGHT IN THIRD PARTY DEFENDANTS ALLEGING THEM TO BE INDEMNITORS WHICH THIRD PARTY DEFENDANTS FILED THEIR MOTION TO DISMISS THE ACTION ON THE GROUND THAT THE PLAINTIFFS SHOULD HAVE INSTITUTED THEIR ACTION JOINTLY AGAINST THE PRINCIPALS AND SURETY ON THE BOND—THE BOND PROVIDING THAT CERTAIN PERSONS AS PRINCIPALS AND "X" SURETY COMPANY AS SURETY ARE HELD AND FIRMLY BOUND UNTO OBLIGEES FOR PAYMENT OF WHICH THE UNDERSIGNED PRINCIPALS AND SURETY FIRMLY BIND THEMSELVES BY THESE PRESENTS—THE LOWER COURT ENTERED NO ORDER ON MOTION TO DISMISS. APPELLANTS CONTEND THAT FINAL JUDGMENT WAS IN EFFECT A DENIAL OF SUCH MOTION—IF SO, WAS THIS REVERSIBLE ERROR?

It is our purpose to present argument upon the points of law covered by the above question but before doing so we respectfully direct the Court's attention to the fact that the motion to dismiss was not ruled upon by the District Court; therefore, this question was not preserved for review upon appeal. As authority, we quote *from AMERICAN JURISPRUDENCE, Volume 3, pages 46 and 47* to-wit:

> "Sec. 270. GENERALLY; NECESSITY.—In order that a question may be preserved for review upon appeal, it is generally necessary that there be an actual ruling upon the point. If a

party permits the court to proceed to judgment without action upon his motion or objection, he will be held to have waived the right to have the same acted upon."

We now proceed with the propositions of law covered by the above question:

ASSUMING THAT THE BOND WAS JOINT AND THAT THE ACTION IN THE STATE COURT SHOULD HAVE BEEN AGAINST BOTH PRINCIPALS AND SURETY, WHEN THE CASE WAS REMOVED TO THE FEDERAL COURT UNDER THE THIRD-PARTY RULE, THE THIRD PARTY DEFENDANTS WERE THEN IN A POSITION TO ASSERT ANY DEFENSES WHICH THEY COULD HAVE ASSERTED HAD THEY BEEN MADE JOINT DEFENDANTS.

The purpose of the technical requirement of the common law that all persons jointly liable should be made defendants was to permit either of the obligors to assert any defense which he might have to the obligees' claim, which defense would defeat recovery as to all. Rule 14 of the *"RULES OF CIVIL PROCEDURE"*, provides as follows, to-wit:

"(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defense as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff,

> the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the Plaintiff or to the third-party plaintiff.******"

Petitioners ground their entire argument upon the premise that "Rule 14, of said Rules of Civil Procedure, does not give the privilege to Third Party Defendants to plead any defense, but only that defense which the Third Party Plaintiff might plead to the original claim." That contention is in the teeth of the finding of the Circuit Court of Appeals, to-wit:

> "(3, 4) In the case at bar the rights of the third-party defendants were in no way prejudiced by removal of the cause to the federal court. Outmoded technicalities and refinements of procedure no longer obtain in federal courts; the object of the new rules being to facilitate the trial and disposition of causes and all matters in controversy upon their merits. Here appellants were properly before the court under the provisions of Rule 14(a), 28 U.S.C.A. following section 723c. They could have interposed any defenses they had, or that the defendant surety company had, and failing to there and then avail themselves of these rights they may not now be heard to complain."

The above rule says specifically "the Third Party Defendant shall make his defense *** and may assert any defenses which the Third Party Plaintiff has to the Plaintiff's claim." Most assuredly, the meaning of this portion of the rule is clear and any defense which the said Petitioner had should have been interposed by him

whether it was direct or whether conferred through the Third Party Plaintiff, but as a factual matter, if the bond was joint as they insistently urge, any defense was available to the Third Party Defendant and the Third Party Plaintiff. On the other hand, if the bond was several, then this question does not arise. Accordingly, there could have been no denial of due process of law.

Said in another way, the error, if any, in not suing the principals and the surety jointly upon the Supersedeas Bond was cured when the defendant surety company brought in the Petitioners as Third Party Defendants. It would indeed be an incongruous anomaly to allow a third party defendant who is properly in Court to complain of the fact that a judgment was not entered against him. Plaintiffs obtained a judgment against the Defendant; the latter, as Third Party Plaintiff, obtained a judgment against the Third Party Defendants, and is certainly not complaining because it did not appeal from the Plaintiffs' judgment, so the Petitioners' argument resolves itself into a reductio ad absurdum—that they could have defended but they did not defend and now say that the Plaintiffs' judgment was not against them also. We submit that our contention in this regard is tenable and correct.

THE OBLIGATIONS OF THE SURETY IN SAID BOND CREATED A SEVERAL LIABILITY.

The terms of the bond indicate clearly that it was a joint and several bond. We quote from the Bond, as follows:

> "KNOW ALL MEN BY THESE PRESENTS, that Robert R. Williams, John W. DuBose, Ralph B. Ferguson and Anna M. Perry, as the City Commissioners of the City of Miami, Florida, *as Principals,* and United States Fidelity and Guaranty Company of Baltimore, Maryland, *as surety,* a surety company authorized to do business in the State of Florida, are held and firmly bound unto Kenneth S. Keyes, Alex M. Balfe and C. D. Van Orsdel, in the sum of Five Thousand Dollars ($5,000.00) for the payment of which well and truly to be made, the undersigned *Principals* and *Surety* firmly bind themselves by these presents.
>
> *****
>
> "The Condition of This Obligation Is Such That, Whereas, the above named plaintiffs on the 10th day of November, 1938, obtained a final decree ..... duly recorded in Chancery Order Book ....., page ....., in the office of the Clerk of the Circuit Court of Dade County, Florida, *against the defendants as the City Commission* of the City of Miami, Florida, as above named;
>
> *****
>
> "Now, Therefore, if the said Final Decree heretofore made and rendered in this cause shall be affirmed by the Appellate Court, or said appeal be dismissed, *and the defendants shall well and truly pay to the Plaintiffs* the cost of the suit now pending in the Circuit Court and in the Appellate Court, together with a reasonable Attorney's fee for the Plaintiffs for services performed in the appeal to the Supreme Court

> from the Final Decree heretofore entered in said cause, then this obligation shall be null and void, otherwise, to be and remain in full force and effect."
>
> (*Italics Ours*)

Nothing in the above quoted language expressly or impliedly makes this a joint obligation; on the contrary it binds respectively certain named persons as principals and another as surety for the payment. The last clause means that the principals as one class bind themselves and the surety as another class binds itself to the conditions of the bond. Indeed, the condition of the bond is that if the defendants to the recall suit shall well and truly pay the plaintiffs the cost of the suit and the cost on appeal, then the bond should become void, otherwise, the surety obligated itself distinctly to pay individually and severally under the bond. The surety did not bind itself to pay until the defendants in the recall suit had defaulted in the terms of the bond. This was a separate, several and distinct promise to pay an obligation on the part of the surety. If it had been solely a joint bond why were the parties designated separately and why did they bind themselves to do different things?

In the case of *MARIPOSA COUNTY v. KNOWLES*, (Cal.), 79 *Pac.* 525, that Court held:

> "Where by the terms of a bond the Principal and Surety is bound in the sum specified, the bond is joint and several for that sum whether it is so stated or not."

In *RILEY v. JARVIS, et al.*, (*W.Va.*), 26 *S. E.* 366, the following is found:

> "Where the Surety does not sign the note but puts a memorandum at its foot that he binds himself as surety for the payment of the note

> it is the same. The obligation is joint and several. Hunt v. Adams, 5 Mass. 358. Wilson v. Campbell 1 SCAM 493."

The same situation exists in this case. The Surety did not sign the bond as Principal but plainly throughout the bond wherever its name is mentioned it is definitely stated that it is bound only as the Surety. The obligations of the Principal and Surety are not joint in this suit but are entirely separate and distinct—That of the Principals is to pay the costs, in the Lower Court and in the Appellate Court, of the recall suit, and that of the Surety is to pay in event of the default of the Principals to pay the costs.

See *MORRISON vs. AMERICAN SURETY COMPANY OF NEW YORK* (*Penn.*), 73 *Atl.* 10, where the following is found: (Page 11)

> "The obligors primarily do not declare in the bond that they are 'jointly' liable nor do they use any similar language which shows that their undertaking is a joint one. When, however, in the subsequent part of the bond, they state the character of their liability, they employ language which expressly declares that each is liable on the obligation. 'The principal binds himself' and the 'said surety binds itself' is the language of the instrument. It will be observed that these words disclose more clearly an intention on the part of the obligors to assume a several liability than the words used in many of our cases, quoted above, and which we have declared do create a severance. In those cases the singular number, and the words 'each', 'every', 'respectively', and 'several' were the effective words in the instrument to create the severance. Here, in language much more direct and forceful than those words, it is declared that the 'principal binds himself', and the 'said surety binds itself'. This is a declara-

> tion of a distinct and separate obligation by each obligor for the payment of the sum named in this instrument. The principal assumes the obligation imposed by the contract, and the surety likewise. Each in a separate capacity, as the language clearly shows. In effect the bond declares we are held and firmly bound in the sum of ..... dollars, for the payment of which each obligor is responsible. By the covenant of the parties each assumed a separate obligation to pay the sum named in the bond, and thus, under our decisions, a joint and several obligation is imposed on which an action will lie against both or either of the obligors."

See also *AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY v. MILWAUKEE HARVESTER CO.* (*Md.*), 48 *Atl.* 72; *YADUSKY, et al. v. SHUGARS, et al.* (*Penn.*) 151 *Atl.* 785.

If the instrument was only a joint one the parties would not have bound themselves as Principals and Surety to pay the sum of Five Thousand Dollars ($5,000.00), but would have bound themselves to pay this sum—in other words, all of the signers would have been principals. Their obligations were separate and distinct, the obligation of the Surety being contingent on a default of the Principals, and since this is so there surely could not have been a joint obligation only.

The UNITED STATES SUPREME COURT in the case of *JAMES C. BABBITT, etc., v. JOHN SHIELDS and JOHN FINN,* 101 *U. S.* 7, 25 *L. Ed.* 820, on page 822, had this to say on this question:

> "It is not necessary, in order to charge the sureties in an appeal bond, that an execution on the judgment recovered in the appellate court should be issued against the principal.

> When they execute the bond, they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the appellate court, either directly or by a mandate sent down to the subordinate court, the sureties, proprio vigore become liable to the same extent as the principal obligor."

There is no case cited in the brief of Petitioners wherein any Court construed a bond having the same wording as the bond in the instant case to be such a joint undertaking so as to require the declaration to be framed against the Principals and Surety.

Inference is made by Petitioners that the injunction bond in the case of *NELSON v. ZIEGFELD*, 100 *Fla.* 1433, 131 *So.* 316, was the same kind of bond as is here involved. Such is not true because the Nelson case was an assumption by two persons of certain mortgage notes. There was no surety relationship involved. The Supreme Court of Florida has held what to our minds is convincing on this point, and when presented squarely, we believe it will hold that a surety on a supersedeas bond is severally liable. We refer to the case of *COZINE et al. v. RANDOLPH, et al.*, 71 *Fla.* 603, 72 *So.* 177, and quote therefrom:

> "Sureties upon a bond may be bound, though the feme covert principal be not bound."

This holding was affirmed in the latter case of *FLORIDA SCHOOLBOOK DEPOSITORY, INC., v. LIDDON*, 114 *Fla.* 378, 153 *So.* 902-903, from which we quote:

> "(1, 2) Sureties upon a bond may be bound though the principal be not bound because the principal named is fictitious or because the

> principal is under some legal disability prohibiting his being bound as such. Cozine v. Randolph, 71 Fla. 603, 72 So. 177. The rule is that one who signs as surety warrants the existence and validity of the obligation of the party named as principal. This is so, although it may transpire that one or more of the signatures of the principals are forged. 8 Am. St. Rep. 247 note."

It would seem to naturally follow that, if a surety is bound, even though the principal be not bound, the mere denomination of one party as principal and another as surety creates a several obligation and either party can be sued without joining the other. We must, therefore, conclude that, inasmuch as the Supreme Court of Florida and the Supreme Court of the United States have held a surety to be bound even though the principal be not bound, it logically folows that the obligation of a surety on a supersedeas bond is several and the obligees were entitled in this case to have sued the surety alone.

CONCLUSION

In one respect at least this case presents a novel proposition—the failure of the judgment debtor to take an appeal and the appeal being taken from that judgment by Third Party Defendants, who were not parties thereto. There is nothing in Rule 14, nor in Rule 74, which gives them the right to appeal from the Plaintiffs' judgment against the Defendant. It is true that Rule 14 provides that the Third Party Defendant is bound by the adjudication of the Third Party Plaintiff's liability to the plaintiff; but this simply means that as between the Third Party Plaintiff and the Third Party Defendants, the Third Party Defendants cannot question an adjudication of liability on the part of the Third Party Plaintiff to the main Plaintiff. The provision of the rule does not mean that the Third Party Defendant is bound *to the Plaintiff* by the adjudication of the Third Party Plaintiff's liability to the Plaintiff. Rule 74 simply provides that parties interested jointly, severally or otherwise, in a judgment, may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately, or any two or more of them may join in an appeal. The mere fact that it says "or otherwise" does not extend the right of appeal to Third Party Defendants from judgments which they are not parties to because the rule is that no one not a party or a privy to the record may appeal. We have found no Statute, Rule or authority in support of such procedure, but to the contrary, find that this Court has held that one not a party to a judgment is not entitled to appeal therefrom.

We quote from *UNITED STATES EX. REL. LOUISIANA v. JACK,* 61 Law Ed. 1222, 244 U. S. 397, page 402:

"With exceptions not even remotely applicable to a case such as we have here it has long been the law, as settled by this court, that 'no person can bring a writ of error (an appeal is not different) to reverse a judgment who is not a party or privy to the record' (Bayard v. Lombard, 9 How. 530, 551, 13 L. ed. 245, 254); and in Re Leaf Tobacco Board of Trade, 222 U. S. 578, 56 L. ed. 323, 32 Sup. Ct. Rep. 833, it was announced in a per curiam opinion, as a subject no longer open to discussion, that *'one not a party to a record and judgment is not entitled to appeal therefrom,'* and that a refusal after decree to permit new parties to a record cannot be reviewed by this court directly on appeal, or indirectly, by writ of mandamus, under circumstances such as were there and are here presented."

(*Italics ours*)

For this reason alone, the petition for certiorari should be denied.

On the question of the correctness of the respective decisions of the District Court and the Circuit Court of Appeals, we conclude by pointing out that the motion to remand was correctly overruled and the Federal District Court properly exercised jurisdiction because the suit by the original Defendant upon Third Party Defendants' Indemnity Agreement constituted ancillary subject-matter which is covered by Rule 14. The motion to dismiss by the Third Party Defendants raising the question of a joint obligation by the principals and surety on the Supersedeas Bond was not ruled upon by the District Court and the question was waived. Treating the final judgment as denying such motion, then it is our position that such Third Party Defendants, because being vested with the right under Rule 14 to present any defenses which they or the original Defendant might have, they, for all practical purposes, were De-

fendants the same as if they had been named as such in the declaration. However, if we be incorrect in these two assertions, we say that the terms of the bond accorded to the Obligees the right to sue the surety without joining the principals and we contend that the use of the terms "principal" and "surety" creates a several obligation, particularly in view of the contingency that the Defendants must default before there is a right of action under the bond.

Respectfully submitted,

M. LEWIS HALL,
916 Ingraham Building,
Miami, Florida.

Attorney for Respondents,
KENNETH S. KEYES, ALEX M. BALFE and C. D. VAN ORSDEL